IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. [redacted]

RUDOLPH LOMBARD, ET AL.,
Petitioners,

versus

STATE OF LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

JOHN P. NELSON, JR.,
702 Gravier Building,
535 Gravier Street,
New Orleans 12, Louisiana;
LOLIS E. ELIE,
NILS R. DOUGLAS,
ROBERT F. COLLINGS,
2211 Dryades Street,
New Orleans, Louisiana,
Attorneys for Petitioners.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

INDEX.

TABLE OF CASES.

TABLE OF CASES—(Continued)

TABLE OF CASES—(Continued)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. ———

RUDOLPH LOMBARD, ET AL.,

Petitioners,

versus

STATE OF LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled case on June 29, 1961, rehearing denied October 4, 1961.

CITATIONS TO OPINIONS BELOW.

The trial judge for the Criminal District Court of Orleans Parish rendered written reasons for overruling the petitioners' motion to quash. These reasons, totaling 44 pages, are found on pages 32 through 76 of the transcript. No written or oral reasons were given

by the trial judge when he found the defendants guilty. The opinion rendered by the Supreme Court of Louisiana is reported in 132 So. (2d) 860, as *State v. Goldfinch, et al.*

JURISDICTION.

The judgment of the Supreme Court of Louisiana was entered on June 29, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3), petitioners claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

Petitioners, three Negro students and one white student, acting in concert, sat down and sought food service at a lunch counter which served only white people in a public establishment which welcomed their trade without racial discrimination at all counters but that lunch counter; for that they were arrested and convicted of "criminal mischief." Under the circumstances of the arrest and trial were the petitioners deprived of rights protected by the

1. Due process clause of the Fourteenth Amendment in that they were convicted on a record barren of any evidence of guilt;
2. Due process clause of the Fourteenth Amendment in that they were convicted under a penal provision which was so indefinite and vague as to afford no ascertainable standard of criminality;
3. Due process and equal protection clauses of the Fourteenth Amendment to the United States Con-

stitution in that they were arrested and convicted to enforce Louisiana's state policy of racial discrimination;

4. Due process clause of the Fourteenth Amendment, as that clause incorporates First Amendment type protection of liberty of speech and expression;

5. Due process clause of the Fourteenth Amendment in that the trial judge refused petitioners the right to introduce evidence showing that the store owners were acting in concert with and or in behalf of municipal and state law enforcement agencies and officers;

6. Due process clause of the Fourteenth Amendment in that the trial judge allowed the state to introduce hearsay evidence over defendants' objection, which evidence was used to furnish one of the necessary elements in the alleged crime;

7. Due process clause of the Fourteenth Amendment in that the trial judge continued to ask state witnesses leading questions dealing with material and relevant facts over the objection of defendants.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Louisiana statutory provision involved is LSA-R. S. 14:59 (6):

> "Criminal mischief is the intentional performance of any of the following acts: * * *

"(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

"Whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

STATEMENT.

SEPTEMBER 10, 1960—A group of Negroes conducted a "sit-in" demonstration at Woolworth's Department Store in the City of New Orleans. This was a peaceful demonstration and was the first of its kind to take place in the city.

SEPTEMBER 10, 1960—Later the same day, Superintendent of Police for the City of New Orleans issued a statement (Appellant II) which was highly publicized in the newspapers. It was also carried on TV and radio. The statement read as follows:

"The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

"We urge every adult and juvenile to read this statement carefully, completely and calmly.

"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the City of New Orleans and the State of Louisiana."

SEPTEMBER 13, 1960—De Lesseps Morrison, then mayor of the City of New Orleans, issued a highly publicized statement (Appellant I) setting forth the city's policy of handling these peaceful demonstrations. The statement reads in part as follows:

"I have today directed the Superintendent of Police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted."

* * * * * *

"It is my determination that the community interest, the public safety, and the economic welfare of this City require that such demonstrations cease and that henceforth they be prohibited by the Police Department."

SEPTEMBER 17, 1960—The defendants, three Negroes and one white, acting in concert (Tr. p. 133) in an orderly and quiet manner (Tr. pp. 103, 107), at approximately 10:30 a. m., requested to be served food at the "white" refreshment bar in McCrory's Five and Ten Cent Store, 1005 Canal Street, New Orleans, La. Be-

cause three were Negroes, all were refused service. (Tr. p. 117.)

The continued presence at the "white" counter of the defendants, after refusing to move to the "colored" counter (Tr. p. 100) was considered by Mr. Graves, restaurant manager, as an "unusual circumstance" (Tr. p. 103), or an "emergency" (Tr. p. 100), hence he ordered the counter closed down (Tr. p. 100) and called the police (Tr. p. 101).

After the police arrived on the scene, and after a conference with Captain Lucien Cutrera of the New Orleans Police Department (Tr. p. 125), Mr. Wendell Barrett, in a loud voice, told the defendants that the department was closed and requested them to leave the department (Tr. p. 110). When they did not answer or comply with the request, Major Edward Ruther, a member of the New Orleans Police Department, gave the defendants two minutes within which to leave. (Tr. p. 115.) After waiting approximately six minutes, the defendants were placed under arrest (Tr. p. 122), charged and convicted under R. S. 14:59 (6).

McCrory's, at 1005 Canal Street, is part of a national chain operating in thirty-four states, owned by the McCrory Stores, Incorporated. (Tr. p. 22.) It is classified as a "variety of merchandise" type store (Tr. p. 109), made up of approximately twenty departments (Tr. p. 119) and open to the general public (Tr. p. 21). Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter that seats 53, a refreshment bar that seats 24 and two stand-up

counters. (Tr. p. 99). All of the eating facilities are segregated. There are no signs indicating whether service at any particular counter is limited to either Negro or white. (Tr. pp. 106, 107.)

Mr. Barrett, the manager at McCrory's for the past two and one-half to three years (Tr. p. 21), had previously served as manager for the McCrory stores in Savannah and Valdesta, Georgia. (Tr. p. 21.) He has never been employed in a "desegregated" McCrory store. (Tr. p. 24.)

The store's segregation policy is determined by local tradition, law and custom, as interpreted by the manager. (Tr. p. 24.) The manager, Mr. Barrett, testified that his decisions relative to segregated lunch counters within the store conform to state policy, practice and custom. (Tr. p. 28.)

HOW THE FEDERAL QUESTIONS ARE PRESENTED.

The federal questions sought to be reviewed here were raised in the court of first instance (the Criminal District Court for the Parish of Orleans, Section "E") on the 17th day of October, 1960, by petitioners' timely motion to quash the information. (Tr. p. 9.) Among other allegations, the motion contains the following:

> "2. That the said defendants are being deprived of their rights under the 'equal protection and due process' clauses of both the Constitution of Louisiana and of the United States of America, in that the said law under which the Bill of Information is founded is being enforced against

them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and illegally, and only against persons of the Negro race and/or white persons who act in concert with members of the Negro race.

"7. That the refusal to give service solely because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution, in that the act of the Company's representative was not the free will act of a private individual, but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of race at lunch counters.

"8. That the arrest, charge and prosecution of the defendants are unconstitutional, in that they are the result of state and municipal action, the practical effect of which is to encourage and foster discrimination by private partie ".

The motion was argued, submitted and denied on November 28, 1960, to which ruling petitioners objected and reserved a formal bill of exception.

Petitioners' case came on for trial on the seventh day of December, 1960. Following the verdict of guilty, a motion for a new trial (Tr. p. 76) and a motion in arrest of judgment (Tr. p. 80) were filed, which motions alleged, *inter alia* (Tr. p. 77):

"The verdict is contrary to the law in that:

"E. The evidence offered against defendants in support of the information charging them with violation of L. S. A.-R. S. 14:59(6) establishes that at the time of arrest and at all times covered by the charges, they were in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom and usage of racial discrimination in McCrory-McLennan Corp., an establishment performing an economic function invested with the public interest; that defendants were peacefully attempting to obtain service in the facilities of McCrory-McLennan Corp., in the manner of white persons similarly situated and at no time were defendants defiant or in breach of the peace and were at all times upon an area essentially public, wherefore defendants have been denied rights secured by the due process and equal protection clauses of the 14th Amendment of the United States Constitution;

"F. The evidence establishes that prosecution of defendants was procured for the purpose of preventing them from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protecting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in New Orleans to permit defendants and other members of the Negro race from enjoying the access to facilities and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempt-

ing to employ the aid of the court to enforce a racially discriminatory policy contrary to the due process and equal protection clause of the 14th Amendment to the Constitution of the United States."

The motions for a new trial and to arrest the judgment were denied (Tr. p. 4), and petitioners filed forthwith a bill of exception, renewing all reservations, motions and bills of exception previously taken. (Tr. p. 84.)

Thereafter, on January 10, 1961, petitioners appealed to the Supreme Court of the State of Louisiana, and also urged during the course of that appeal that the verdict and the sentence deprived the petitioners of the equal protection afforded by the 14th Amendment to the United States Constitution.

Prior to trial on the merits, certain evidence was introduced in support of motion to quash and assertion of various constitutional defenses under the Fourteenth Amendment to the Constitution of the United States. The motion to quash was duly overruled.[1]

The case was subsequently fixed for trial and all petitioners found guilty.[2] They were each sentenced to pay a fine of $350.00 and imprisonment in Parish Prison for sixty (60) days, and in default of the payment of fine to imprisonment in Parish Prison for sixty (60)

[1] See pages 32 through 76 of the transcript for the written judgment of trial judge setting forth the reasons for overruling the motion to quash.

[2] No written or oral reasons were given by the trial judge when he found the petitioners guilty.

days additional. Motion for new trial was made and denied. The matter was appealed to the Supreme Court of Louisiana, where the conviction was affirmed and rehearing denied. Application for stay of execution for sixty (60) days was granted by the Chief Justice of the Louisiana Supreme Court on October 6, 1961.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional Rights.

A. The decision below conflicts with prior decisions of this Court which condemn racially discriminatory administration of State criminal laws.

1. The person in charge of the place of business, in ordering defendants to leave, did not thereby perform a purely private act; rather he acted for the state, under the terms of the statute, in order to comply with the policy of segregation established by the legislative and executive officers of the state.

His act is comparable to that of individuals holding no state office who challenged the voters' registration of 1,377 Negroes in Washington Parish, La., under provisions of Louisiana statutes. "The individual defendants, in challenging the registration status of voters, were acting under color of the laws of Louisiana. Providing for and supervising the electoral process is a state function. *Terry v. Adams*, 345 U. S. 461, 73 S. Ct. 809, 97 L. Ed. 1152. The individual defendants participated

in this state function under express authority of Louisiana law, using state facilities made available to them. LSA-R. S. 18:245. Their actions formed the basis of the removal of citizens from the registration rolls by the defendant Registrar acting in his official capacity. See *Shelley v. Kraemer*, 334 U. S. 1, 20, 68 S. Ct. 836, 92 L. Ed. 1161; *United States v. McElveen*, 180 F. Supp. 10 (E. D. La., 1960), aff'd *sub nom United States v. Thomas*, 362 U. S. 58 (1960).

By analogy, the person in charge of McCrory's acted under express authority of a Louisiana statute when he ordered the defendants to move, and thereby participated in the state function of maintaining order in places where the public gathers. His action formed the basis of their arrest. The only facilities used in the *McElveen* case were the files in the registration office. In the instant case, the police power was used with its facilities. His act was as much under color of law as was the act of the individuals enjoined in the *McElveen* case.

2. His act was not a private one for the additional reason that it was not a free will act of a private individual, but rather an act encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.

The state action limited by the Fourteenth Amendment is not only that of public officers or with public funds or on public property. It includes private operations under many circumstances. See *Abernathy, Expansion of the State Action Concept Under the Fourteenth*

Amendment, 43 Cornell L. 2. 375 (1958); *Shanks, State Action and the Girard Estate Cast*, 105 U. Pa. L. Rev. 213 (1956).

Unlike the situation in *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir., 1959), the state officers did not merely acquiesce in the custom of segregation but actually aided and abetted it, thereby making the private act take on the character of a public one. *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir., 1949).

In Louisiana, custom and received usages have the force of law. La. R. C. C. Articles 3 and 21 (1870). If the custom is discriminatory and was applied by act of the person in charge of the store, then it can be called discrimination under the law. This is comparable to the attempt by another state to charge a defendant with the common law offense of inciting a breach of the peace, *Cantwell v. Connecticut*, 310 U. S. 296 (1940), or the application of a common law policy of a state forbidding resort to peaceful persuasion through picketing. *A. F. L. v. Swing*, 312 U. S. 321 (1941). Both these cases indicated that such customary activity could constitute state action.

The store manager acted not privately, but under the influence of the public policy expressed in the statute, the widespread custom of segregation in the community, and especially the expressed policy of city officials, in ordering the defendants to move, thereby denying them their constitutionally guaranteed rights.

3. The Fourteenth Amendment to the United States Constitution forbids state action which deprives persons of equal protection under the law.

As indicated above, state action is clearly present in the instant case, first, by the act of the person in charge of McCrory's in acting under authority of a statute and in acting as encouraged by state policy; second, by the act of the police in arresting defendants; third, by the act of the district attorney in charging defendants; and fourth, by the act of this Honorable Court in trying defendants' guilt.

However, state action is of course permissible unless it is wrongly used. It is not permissible under the Fourteenth Amendment if it deprives a person of any constitutionally protected right, including the right to equal protection under the law, and the right of free speech and the right to property.

Hence, if state action, that is, action under the law, deprives a person of equal protection, it is a violation of the Amendment.

a. The order to move, the arrest, the charge, the prosecution, and the trial of defendants constitute state action which denied these defendants equal protection as there was no reasonable basis for treating them differently from any other potential customer at the lunch counter, the only basis being their race, which is an irrelevant basis. True, their race could be sufficient basis for private discrimination, but not for state action.

b. Even if this broad inequality of treatment were not a sufficient deprivation of constitutionally protected right, other such rights have been harmed by state action. One such right is the right of free speech discussed elsewhere.

c. Another phase of equal protection guaranteed by the Constitution is the right to contract, or at least the right to attempt to enter into a contract in the same manner open to other persons similarly situated, which right is a necessary corollary of the right of property, that is, the right to attempt to acquire property as would other persons similarly situated, or, by contract. *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir., 1949). The equal protection guarantee is the constitutional basis for 42 U. S. C. § 1981 which assures the right to make and enforce contracts and § 1982 which assures the right to purchase and otherwise transact concerning real and personal property. Id.; *Buchanan v. Worley*, 245 U. S. 60 (1917); *Hurd v. Hodge*, 334 U. S. 24 (1948). Cf. *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

Judicial enforcement of a discriminatory restrictive covenant unconstitutionally deprives a person of the equal right to acquire property. *Shelley v. Kraemer*, 334 U. S. 1 (1948). In that case, a third party was not permitted to use judicial power to enforce the restriction against two contracting parties, the Negro being a willing purchaser from a willing vendor. In *Valle v. Stengel*, the unwilling vendor was not permitted to use police power to prevent the willing buyer of a ticket to a privately owned swimming pool from "making" a contract.

Note, *Freedom to Contracts—A New Civil Right*, 59 Yale L. J. 1167 (1950).

Defendants wanted to buy lunch. True, the merchant was unwilling to contract and cannot be forced to do so. However, all other persons were free to attempt to contract with the store, but defendants were no longer free to offer to contract because of the interference of the police and other state action. It takes two parties to "make" a contract, but the first necessary element of a contract is an offer. The Constitution in guaranteeing equal protection and property rights does not guarantee that an offer will be accepted and a contract confected, but it puts all persons on an equal footing in denying the right of a state to interfere with the process of contracting, including the right to make an offer. If a white person attempts to buy lunch at McCrory's counter and is refused, along with all other potential customers similarly situated, because the closing hour of the store is approaching and waitresses must clean up before leaving with the other employees, that white potential customer can return at another time of day and make another offer, trying again to make a contract. But defendants are deprived forever of the opportunity of making an offer to try to make a contract due to State interference with their equal right to enter into the contracting procedure preliminary to acquiring property. Property rights are constitutionally protected. Defendants' property rights have been harmed.

4. The fact that the limitation on defendants' freedom occurred on privately owned property does not cause the deprivation of equal protection to be any less uncon-

stitutional—first, because as explained, the fact of ordering, arresting, charging, prosecution and trying, all constitute State action; second, because the fact that the store has been the kind that advertises widely and admits the general public without discrimination causes it to be a *quasi* public place. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, 802 n. 8. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation, and . . . such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce." *Marsh v. Alabama*, 326 U. S. 501 (1946). In that case, the state punished the crime of disturbing religious literature contrary to the wishes of the owner of town under "Title 14, § 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so." The conviction was reversed and remanded as being an unconstitutional deprivation by state action of freedom of speech as an element of due process and equal protection.

In *Valle v. Stengel*, 176 F. (2d) 697 (3d Cir. 1949), the arrest and eviction took place on a privately owned

amusement park to which all the public were admitted and patronage to which was encouraged through advertising. The negroes and the white person acting in concert with them, after being admitted to the park, were refused admission to the pool. The manager was aided and abetted by the police whom he called, so that the police act was attributed to the corporation and its manager and treated as their own. This state action was held to constitute a deprivation of equal protection of the right to contract in pursuit of happiness through use of property.

This is closely comparable to the situation of defendants, admitted to the store but not to the counter.

B. The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.

1. Defendants' presence at the lunch counter was a form of expression, a mean of communication; in the broad sense, it was "speech."

"Speech" protected by the United States Constitution includes modes of expression other than by voice or by press. It includes "a significant medium for the communication of ideas." *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495 (1952). It includes activity forbidden by a statute making it a misdemeanor to "go near to or loiter about the premises or place of business of such other persons . . ." It includes such activity "in appropriate places" even though the picketing was on grounds of a privately owned business. *Thornhill v. Alabama*, 310 U. S. 88, 106 (1940).

Speech in the form of boycotting is protected. *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490 (1949). This is true also when it is used to end discriminatory labor practices. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938).

"Speech" in the form of "unfair" lists, picketing to deter showing a certain motion picture, to deter operating shops on Sunday, and to indicate a shop is not Kosher, has been held to be protected free speech by courts of other states.

Defendants' act did not constitute such speech as must be limited; it did not incite to riot as in *Feiner v. New York*, 340 U. S. 315 (1951); rather it was subject to protection even had it created dissatisfaction with conditions as they are, as in *Terminiello v. Chicago*, 337 U. S. 1 (1949).

Hence defendants' act in sitting quietly in a place of business, for the purpose of expressing disapproval of a policy of racial discrimination practiced there, constituted a form of speech. As such it is protected against interference by the state.

2. "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." *Schneider v. State*, 308 U. S. 147 (1939).

When agents of the state (police officers, the district attorney, this Honorable Court) arrested, charged and tried defendants under La. R. S. 14:59(6) (1960),

thereby preventing defendants from continuing their expression of disapproval of policy of racial discrimination by the management of the lunch counter, the State deprives defendants of an element of liberty guaranteed to them under the Fourteenth Amendment against such state action.

Hence, even if it be conceded *arguendo* that the statute might be constitutionally enforced in other circumstances, it may not be so when its enforcement limits a form of communication of ideas, as has been done in the present instance.

Rather than being arrested for their expression of opinion, defendants had a right to expect police protection to preserve order. *Sellers v. Johnson*, 163 F. (2d) 877 (8th Cir. 1947), cert. denied, 332 U. S. 851 (1948).

C. The decision of the trial judge in refusing the petitioners an opportunity to establish actual concert between the store proprietor and the police violated petitioners' right to a fair and impartial trial as guaranteed by the Fourteenth Amendment.

The trial judge refused to allow the petitioners to introduce evidence which would tend to show concerted action between the State law enforcement officers and McCrory's store manager. (See Bill of Exception No. 2, page 85 of transcript.) The highly publicized statement of both the Mayor of the City of New Orleans, *supra*, page 6, and the Chief of Police, *supra*, page 4, form an important backdrop within which to decide this issue.

This expression of policy by the Mayor and the Superintendent of Police of the City of New Orleans oper-

ated as a prohibition to all members of the Negro race from seeking to be served at lunch counters whether or not the proprietor was willing to serve them. More in point, the pronouncement of policy by the leaders of the municipal authority operated to constructively coerce the proprietors of business establishments not to integrate lunch counters at the risk of suffering municipal censure or punishment.

The Supreme Court, in *Civil Rights Cases*, 109 U. S. 3, 17, 27 L. Ed. 835, 841, 3 Supreme Court 18, ruled that racial discriminations which are merely the wrongful acts of individuals can remain outside the ban of the Constitution only so long as they are unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. In order to successfully attack the administration of the statute, it was necessary that defendants prove concert between the store manager and the police. This was relevant evidence, the exclusion of which was prejudicial to the defendants as it deprived them of the only means they had to show that they were the victims of prohibited state action rather than protected personal rights of the proprietor.

II.

The Public Importance of the Issues Presented.

A. This case presents issues posed by numerous similar demonstrations throughout the nation which have resulted in widespread desegregation and also in many

similar cases now pending in the state and federal courts. Petitioners need not multiply citations to demonstrate that during the past year thousands of students throughout the nation have participated in demonstrations like those for which petitioners have been convicted.

A comprehensive description of these "sit-in" protests appears in *Pollitt, Dime Store Demonstration: Events and Legal Problems of the First Sixty Days*, 1960 Duke Law Journal 315 (1960). These demonstrations have occurred in Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, Texas, Virginia and elsewhere. *Pollitt, supra, passim.*

In a large number of places this nationwide protest has prompted startling changes at lunch counters throughout the South, and service is now afforded in many establishments on a nonsegregated basis. The Attorney General of the United States has announced the end of segregation at public lunch counters in 69 cities, *New York Times*, August 11, 1960, page 14, col. 5 (late city edition), and since that announcement the number of such cities has risen above 112, *New York Times*, Oct. 18, 1960, page 47, col. 5 (late city edition).

In many instances, however, these demonstrations, as in the case at bar, have resulted in arrests and criminal prosecutions which, in their various aspects, present as a fundamental issue questions posed here, that

is, may the state use its power to compel racial segregation in private establishments which are open to the public and to stifle protests against such segregation. Such cases having been presented to the Supreme Court of Appeals of Virginia,[3] the Supreme Court of North Carolina,[4] the Supreme Court of Arkansas,[5] the Court of Criminal Appeals of Texas,[6] the Court of Appeals of Alabama,[7] the Court of Appeals of Maryland,[8] several South Carolina appellate courts,[9] and the Georgia Court of Appeals.[10] Numerous other cases are pending at the trial level.

It is, therefore, of widespread public importance that the Court consider the issues here presented so that

---

[3] **Raymond B. Randolph, Jr., v. Commonwealth of Va.** (No. 5233, 1960).

[4] **State of N. C. v. Fox and Sampson** (No. 442, Supreme Court, Fall Term 1960).

[5] **Chester Briggs, et al., v. State of Arkansas** (No. 4992) (consolidated with **Smith v. State of Ark.**, No. 4994, and **Lupper v. State of Ark.**, No. 4997).

[6] **Briscoe v. State of Texas** (Court of Crim. App., 1960, No. 32347) and related cases (decided Dec. 14, 1960; conviction reversed on ground that indictment charging in alternative invalid for vagueness).

[7] **Bessie Cole v. City of Montgomery** (3rd Div. Case No. 57) (together with seven other cases, Case Nos. 58-64).

[8] **William L. Griffin, et al., v. State of Maryland**, No. 248, September Term 1960 (two appeals in one record); see related civil action sub nom. **Griffin, et al., v. Collins, et al.**, 187 F. Supp. 149 (D.C. D.Md. 1960).

[9] **City of Charleston v. Mitchell, et al.**, (Court of Gen. Sess. for Charleston County) (appeal from Recorders Ct.); **State v. Randolph, et al.**, (Court of Gen. Sess. for Sumter County) (appeal from Magistrates Ct.); **City of Columbia v. Bouie, et al.**, (Court of Gen. Sess. for Richland County) (appeal from Recorders Ct.).

[10] **M. L. King, Jr., v. State of Georgia** (two appeals: No. 38648 and No. 38718).

the lower courts and the public may be guided authoritatively with respect to the constitutional limitations on state prosecutions for engaging in this type of protest.

B. The holding below, if allowed to stand, will in effect undermine numerous decisions of this Court striking down state enforced racial discrimination. For example, the discrimination on buses interdicted by the Constitution in *Gayle v. Browder*, 352 U. S. 903, aff'd 142 F. Supp. 707, could be revived by convictions for disturbing the peace. In the same manner, state enforced prohibitions against members of the white and colored races participating in the same athletic contests, outlawed in *Dorsey v. State Athletic Commission*, 168 F. Supp. 149, aff'd 359 U. S. 533, could be accomplished. Indeed, segregation of schools, forbidden by *Brown v. Board of Education*, 347 U. S. 483, and innumerable cases decided since that time, especially those affecting Louisiana, *e. g., Orleans Parish School Board v. Bush*, 242 F. (2d) 156 (5th Cir. 1957), cert. denied 354 U. S. 921. might also be accomplished by prosecutions for disturbing the peace even though no disturbances in fact occurred.

The holding below, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state-enforced racial distinctions. Indeed, the segregation here is perhaps more invidious than that accomplished by other means for it is not only based upon a vague statute which is enforced by the police according to their personal notions of what con-

stitutes a violation and then sanctioned by state courts but it suppresses freedom of expression as well.

CONCLUSION.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN P. NELSON, JR.,
702 Gravier Building,
535 Gravier Street,
New Orleans 12, Louisiana;

LOLIS E. ELIE,
NILS R. DOUGLAS,
ROBERT F. COLLINGS,
211 Dryades Street,
New Orleans, Louisiana,
Attorneys for Petitioners.